IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL

CRIMINAL JAIL APPEAL NO.973 OF 2001

Nilap Singh
S/o Khimraj Singh
R/o Village Chachri, Patti Balso
Tehsil Champawat
District Champawat ..... Appellant

Versus

State of Uttaranchal ..... Respondent

Hon'ble J.C.S. Rawat, J.

This is a Criminal Jail Appeal against the Judgment and order dated 17.03.2001 passed by Sri Lekha Singh, the then session Judge, Pithoragarh in Sessions trial No. 12 of 1995 State Vs. Nilap Singh, whereby the learned Session Judge has convicted and sentenced the appellant U/s 307 I.P.C. to undergo R.I. for 10 years, U/s 316 I.P.C. to undergo R.I. for 5 years and U/s 27 of the Arms Act to undergo R.I. for 3 years. All the sentences were ordered to run concurrently.

The facts, in brief, are that Dungar Singh (PW2) lodged a written report (Ex.Ka2) at Patwari Patti Balso District Pithoragarh on 21.12.1992 at 6.00 a.m. that the accused appellant fired from the Gun at Smt. Munni Devi (PW3) who is the sister of Dungar Singh. On this basis of written report a F.I.R. was prepared and a case was registered U/s 307 I.P.C. and 27 Arms Act against the accused appellant. The Investigating Officer visited the place of occurrence and prepared site plan Ex. Ka 4 and took blood stained stone and clothes into possession from the place of occurrence and prepared Recovery Memo Ex. Ka 5 and Ex. Ka 6 Smt. Muni Devi

was medically examined by Dr. Harish Chandra Pathak, Medical Officer, B.D. Pandey, District Hospital, Pithoragarh on 21.12.1992 at 3.15 p.m. and prepared injury report Ex. Ka 1. The following injuries were found on the person of Smt. Munni Devi.

1. Patient conscious, pulse 120 PM, Low volume, B.P. 84 mm, dehydration present.
2. Oval shaped Incised would 4.5 x 3 cm size (wound of entry); muscle deep edges are irregular; no blackening or tatooing present. It is surrounded by multiple pellet marks spread over an area of 11 x 12 cm some pellets are jilts under subcutaneous tissue. Some hairs (probably from choti) present inside wound. Surrounding of wound bruised. No joint odour present.

-No wound of exit seen.

-Sweater worn by patient contains oval burnt area. Corresponding to wound of entry.

-Clothes stained with blood.

The Doctor opined that the injury is gunshot which was caused on the evening of 20.12.1992 at about 9.00 p.m.

After completing the investigation the Investigating Officer Pitamber Dutt Joshi (PW4) submitted charge sheet (Ex. Ka 7) against the accused.

Charge was framed against the accused on 20.05.1995 under sections 307 I.P.C, 316 I.P.C. and 27 Arms Act to which the appellant denied and claimed trial.

The leaned trial court after appraisal of the evidence on record convicted and sentenced the appellant as mentioned above.

I have heard Sri S.P.S. Panwar, Learned Amicus Curiae on behalf of the appellant and Learned A.G.A. and perused the record.

Smt. Munni Devi (PW3) sustained the injuries on her person. PW2, Dungar Singh and PW3 Smt. Munni Devi have stated in their statements that the appellant fired upon her on 20.12.1992 at about 9.00 p.m. at the place of incident. They have also stated that the firearm injury was caused at her buttock. The firearm injury stands corroborated by the evidence of PW1 Dr. Harish Chandra Pathak, who has stated on oath that he found the gunshot injury on the person of Smt. Munni Devi. However, he has not mentioned the place at which the gunshot injury was found. It has been opined by the doctor that the injury can be caused on 20.12.1992 at 9.00 p.m. He has stated in his cross-examination that he did not mention the place of injury. Thus, it is clear from the evidence that the injury was caused on the person of Smt. Munni Devi at the time of incident.

Now, it is to be seen whether the appellant was responsible for the injury caused on the person of the injured. The prosecution has produced Dungar Singh (PW2) and Smt. Munni Devi (PW3) as eyewitnesses of the incident. Both the witnesses have stated that on 20.12.1992 at about 9.00 p.m. they were sleeping inside their house and the accused came out from his house which is adjacent to the house of the injured. He stared abusing the complainant party. Smt. Munni Devi, who is the sister of Dungar Singh came out from the house and asked the accused not to abuse Dungar Singh. The accused brought fire arm from inside his house and fired upon Dungar Singh, but the fire hit upon Smt. Munni Devi. It is further stated by the

witnesses that Smt. Munni Devi came at the house of his brother Dungar Singh from her in-laws house to attend the marriage, which was to be solemnized at the house of his brother. The evidence of PW2 and PW3 is trustworthy and there is no material contradiction in any of their statement. The defence could not take out anything from their cross-examinations.

It was contended by the Learned Amicus Curiae that there is delay in lodging the F.I.R. The incident took place on 20.12.1992 at 9.00 p.m. and the F.I.R. was lodged on 21.12.1992 at 6.00 a.m. PW2, Dungar Singh has categorically stated in his statement that after the incident he and his sister were inside the house and they were in shock. After some time the appellant also came out and started abusing them. PW2 has also stated that when the appellant went inside the house he went in the village and nobody came to his rescue due to the terror of the appellant. In the morning at about 6.00 a.m. the report was lodged at Patwari Patti Headquarter. The inside took place in the night hour and it is also to be kept in mind that the place of incident falls in the hill area and there was no good means of transport and communication. The F.I.R. also reveals that Patwari Patti Headquarter was 2 kilometers from the place of incident. Keeping in view of the above circumstances there is no delay in lodging the F.I.R. The informant has lodged the report in the early morning at 6.00 a.m. on 21.12.1992. The contention of the Learned Counsel for the appellant is not tenable.

The Investigating Officer Pitamber Dutt Joshi (PW4) has stated in his statement that he took the blood stained clothes from the possession of Smt. Munni Devi from the Hospital. These clothes were

produced before the learned trial court. The Investigating Officer has further stated that he went at the spot and he also collected the blood stained stone from the place of incident. The blood stained stone was also produced before the trial court. It was also contended that blood stained clothes and stone were not sent for chemical examination. It is a fault on the part of the Investigating Officer.

It has been held by the Hon'ble Supreme Court in **Dhanaj Singh Alias Shera & others Vs. State of Punjab 2004 (3) SCC p/654** that in the instant case, the High Court found several disturbing features which indicated how the investigating Officer had made out a new case to save the accused persons and to implicate the complainant party. Hence, the High Court analysed the evidence of the eye-witnesses with due care and caution. On finding the said evidence to be credible, the High Court upheld the conviction recorded by the trial court. Before the Hon'ble Supreme Court, the accused-appellants challenged the conviction on the grounds: (i) that the police after thorough investigation had concluded that it was the complainant party which caused the death of the deceased, (ii) that the pellets, wads and cartridges were not recovered from the spot, (iii) that the weapons of assaults and the pellets were not sent for ballistic examination, (iv) that the blood stained earth was not sent for chemical examination, (v) that many persons who could have thrown light on the incident had not been examined, and (vi) that the evidence being that of highly interested and inimical persons, should have been discarded. Dismissing the appeal, it was held by the Hon'ble Apex Court that even if the investigation is defective, that pales into insignificance when ocular testimony is found credible

and cogent. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. Bu it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.

It has been held in **Chhotu vs. State of Maharashtra 1997 CRI. L.J. 4394 (SC):-**

> *"That necessarily means that all of them were the most natural and probable witnesses to an incident that then took place near his house, notwithstanding the fact that they were not residents of that locality. It also requires to be mentioned here that if the Investigating Officer failed to seize the bloodstained clothes of PWs 3 & 8 and to promptly examine PW3, whose name as any eye witness was disclosed immediately after the incident, it only indicates remissness on his part but the evidence of PWs 3 & 8 was not in any way impaired thereby."*

The Hon'ble Apex Court while maintaining the conviction of the appellant in **Karnel Singh Vs. State of M.P. 1995 CRL. L.J. 4173,** it has been obverted:-

> *"5. Notwithstanding our unhappiness regarding the nature of investigation, have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In cases of defective investigation the Court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer if the investigation is*

designedly defective. Any Investigation Officer, in fairness to the prosecutrix as well as the accused, would have recorded the statements of the two witnesses and would have drawn up a proper seizure-memo in regard to the "Chaddi". That is the reason why we have said the investigation was slipshod and defective."

It was contended by the learned Amicus Curiae that in the first information report (Ex-Ka-2) lodged at the Patti Patwari all the details and the names of the witnesses have not been mentioned. FIR only indicates that on 20-12-92 at about 9:00 p.m. the appellant fired at Smt. Munni Devi, sister of Dungar Singh informant by the gun. It is not necessary to mention all the details as well as the names of the witnesses in the F.I.R. Non-mention of the names of the eyewitnesses in the F.I.R. is not fatal to the prosecution case.

It has been held by the Apex Court in **Bhagwan Singh and other Vs. State of M.P. 2002 SCC (Cri)** P/736:-

"13. We also do not find any substance in the submission of the learned counsel for the appellants that statement of Kiran (PW7) should not be given any weight because her name is not mentioned in the FIR. There is no requirement of law for mentioning the names of all the witness in the FIR, the object of which h is only to set the criminal law in motion. Kiran PW7 herself was injured and being the niece of Hari Ram (deceased), had no reason to involve innocent persons in the commission of the crime. Merely because PWs 7, 12 and 22 happen to be the relations of the deceased, cannot be made a ground to discard their evidence. In the

circumstances of the case, the High Court has rightly found the aforesaid witnesses to be natural witnesses of the occurrence."

Thus non-mention of the names of witnesses in the FIR is not fatal to the prosecution case.

It was further contended that there was no light on the spot and Dungar Singh and Smt. Munni Devi could not have recognized the appellant. PW2 and PW3 have stated that there was light and testimony of the witnesses is unshaken. In the cross-examination, it was suggested that the prosecution witnesses have not stated in the statements U/s 161 Cr.P.C. or in the F.I.R. with regard to the light. It is not necessary that it should be mentioned in the F.I.R. or in the statements U/s 161 Cr.P.C. The submission is insignificant. Even assuming that there was no light in the open area of the house in the cloudless night the witnesses would know the assailant from the close distance. It has been held in **Shiv Raj Bapuray Jadhav Vs. State of Karnataka 2003 SCC (Cri)** p/1372.

"The submission that the occurrence was two days prior to the new moon day and, therefore, the ocular witnesses could not have witnessed the occurrence as they claimed to have, does not appeal to us for the reason that not only, as noticed by the High Court, the parties are used to living in the midst of nature and accustomed to live without light, the parties could have been identified easily not only from the voices but from the fact they are known persons and close relatives and living in the neighboring huts."

Thus, the evidence of prosecution with regard to light is credible and cogent.

It was further contended by the learned Amicus Curiae that the scriber of the F.I.R. who handed over the written report to the police was not produced before the court. The prosecution story is to be discarded on this score alone. P.W.2 Dungar Singh has proved the FIR. In the statement U/s 313 Cr. P.C. the appellant has stated that the F.I.R. was lodged but was wrong. In view of the above statement the argument of the learned Amicus Curiae is not tenable.

The prosecution evidence of P.W.2 and P.W.3 further stands corroborated by the medical evidence. The doctor opined that the injury was caused on 20.12.1992 at 9.00 p.m. and the injury was caused by gunshot. However the injury was found on skin muscle deep.

In view of the foregoing discussion I am of the view that the prosecution evidence with regard to gun shot injury is credible and cogent and the prosecution has been able to prove that the appellant fired on Smt. Munni Devi and she sustained gun shot injury.

Now, I have to decide as to whether gun shot injury was caused with intention to kill her or only to cause hurt. The learned Amicus Curiae contended that there was no intention to cause murder of Smt. Munni Devi and if the court comes to the conclusion that the prosecution has established that there was gunshot injury caused by the appellant on the person of Smt. Munni Devi then it comes within the purview of section 324 I.P.C. and not U/s 307 I.P.C. To gather the intention as to whether the firearm injury was caused to kill Smt. Munni Devi. The statement of Dungar Singh only reveals that the appellant fired upon Dungar Singh but it caused hurt to Smt. Munni Devi meaning thereby there was no intention of the appellant to cause the

death of Smt. Munni Devi. Secondly, the testimony of PW1 and PW2 clearly indicates that the injury was caused at the buttock of Smt. Munni Devi, which is not a vital part of the body and the injury was only on muscle deep. If the appellant would have intention to kill her he could have repeatedly caused the injuries on the person of Smt. Munni Devi, The first information report also does not reveal that the fire was made with intention to kill Smt. Munni Devi meaning thereby there was no intention to cause her death. The appellant has no intention to cause the death of Smt. Munni Devi. Thus, the case falls U/s 324 I.P.C.

The learned trial court after appraisal of the evidence on record found the appellant guilty U/s 316 I.P.C. PW2 and PW3 have stated in their statements that the appellant fired gunshot injury on Smt. Munni Devi as a result of which she sustained gunshot injury and had caused the death of unborn child of Smt. Munni Devi. This evidence does not inspire confidence because the first information report lodged by the informant does not indicate that she was having an unborn child in her womb. Apart from that there is no medical evidence, which shows that any miscarriage or abortion took place due to the said injury. The prosecution has not produced the documentary evidence of the Hospital from where she was treated with regard to the miscarriage of the child.

In view of the forgoing discussion, I am of the view that the prosecution has failed to prove the charge U/s 316 I.P.C.

The accused has further been convicted U/s 27 of the Arms Act. It is not disputed that the accused had a licensee gun. It is not disputed that the gunshot injuries were caused on the person of Smt. Munni Devi.

It is not proved that gunshot injury was caused from the licensee gun of the appellant. Hence, the charge U/s 27 of the Arms Act is not proved.

The appeal is partly allowed. The conviction and sentence awarded by the court below against the appellant under sections 307 and 316 I.P.C. and under section 27 of the Arms Act is set aside and the appellant is acquitted of the charges leveled under sections 307 and 316 IPC and 27 Arms Act. However, the appellant is convicted and sentenced to undergo simple imprisonment for one year under section 324 IPC.

Let the record alongwith a copy of this judgment be sent back to the trial court immediately for necessary action and compliance and the report to be submitted within two months.

(J. C. S. Rawat J)

August 09, 2004